

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND
THE WORKER'S COMPENSATION APPELLATE COMMISSION

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

AMOCO PRODUCTION COMPANY,

Defendant-Appellant.

Supreme Court
Case No. 119410
Associated No. 119403

Court of Appeals
Case No. 223572

WCAC No. 95-000532

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APPELLEE'S BRIEF OF AUTO-OWNERS INSURANCE COMPANY

Oral Argument Requested

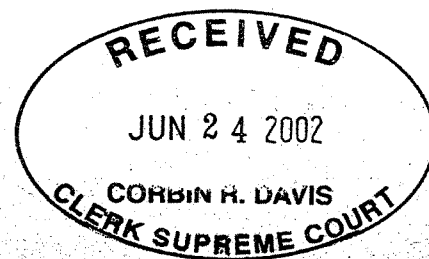


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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Was appellate review of the interest issue waived when neither party made a specific request to the WCAC to review the issue?

- The Magistrate did not address this issue.
- The WCAC did not address this issue.
- The Court of Appeals said: "No."
- Defendant-Appellant Amoco says: "No."
- Plaintiff-Appellee Auto-Owners says: "Yes."

II. Ancillary to its jurisdiction pursuant to §§ 841 and 847 of the WDCA to determine equitable subrogation claims involving reimbursement of third-parties for medical expenses which are later determined by the bureau to be work-related, did the bureau have jurisdiction to grant interest on the amount awarded as reimbursement?

- The Magistrate did not address this issue.
- The WCAC did not address this issue.
- The Court of Appeals did not address this issue.
- Defendant-Appellant Amoco says: "No."
- Plaintiff-Appellee Auto-Owners says: "Yes."

COUNTER-STATEMENT OF FACTS

In addition to the facts stated in the brief on appeal of the appellant, the following facts are relevant. Neither Auto-Owners,

1b-3b, nor Amoco, 4b-6b, made any request to the WCAC that the WCAC reviewed the magistrate's award of interest.

Auto-Owners did not request that the Court of Appeals review the magistrate's award of interest either in Auto-Owners' application for leave to appeal or Auto-Owners' brief in the Court of Appeals. 7b-11b. Amoco made no cross-appeal to the Court of Appeals requesting that the Court of Appeals reveal the magistrate's award of interest. The first time either party sought to raise the issue of the magistrate's award of interest was in Amoco's appellee's brief to the Court of Appeals. 12b-14b.

Although the Court of Appeals opinion states that Auto-Owners made a " cursory " request to the Court of Appeals to review the interest issue, *Auto-Owners Ins Co v Amoco Production Co*, 245 Mich App 171, 178 (2001), a review of Auto-Owners' brief on appeal shows that this was a misinterpretation, 10b-11b, and that it was in fact Amoco which first raised the interest issue in its appellee's brief. 12b-14b.

JURISDICTIONAL SUMMARY

There is no jurisdictional summary in the brief of defendant-appellant Amoco. The Court of Appeals entered its opinion on March 27, 2001. Amoco filed its application for leave to appeal within 21 days pursuant to MCR 7.302(C)(2). Leave to appeal was granted by order of this Court on April 30, 2002.

PRESERVATION OF ISSUE AND STANDARD OF REVIEW

I. The Interest Issue Was Not Preserved

Amoco's brief does not contain a statement of the standard of review or a statement to show whether the interest issue was preserved for appeal as required by MCR 7.212(C)(7) and incorporated by reference in MCR 7.306(A).

The issue raised by appellant Amoco was not preserved for review. Instead, Amoco waived appellate review of the issue by failing to appeal the issue to the WCAC. *Matney v Southfield Bowl*, 218 Mich App 475, 487 (1996), affirmed in part on this ground, 458 Mich 851 (1998). "The WCAC was limited to reviewing 'only' the 'specific' findings or conclusions the parties 'requested to be reviewed.' MCL 418.861a(11); MSA 17.237(861a)(11)." *Weems v Chrysler Corp*, 201 Mich App 309, 316 (1993), affirmed in part on this ground, 448 Mich 679, 686, n.5; 533 NW2d 287 (1995).

Prior to 1985, there was some authority that the WCAC had some discretion to review conclusions of law in addition to those which the parties specifically requested be reviewed. See, for example, *Huey v Campbell, Wyant & Cannon Foundry*, 55 Mich App 227, 230 (1974). However, this apparent discretionary appellate jurisdiction of the administrative review body in the worker's compensation system was taken away by the 1985 reform of worker's compensation enacted by 1985 PA 103. Under the new system, the Worker's Compensation Appellate Commission "shall review only those

specific findings of fact or conclusions of law that the parties have requested be reviewed." MCL 418.861a(11). The plain meaning of subsection (11) is that a party waives appellate review of an issue where the party does not request that the specific issue be reviewed.

The procedural history which demonstrates that the interest issue was not preserved and that Amoco waived appellate review of the issue is as follows:

The magistrate found that the injury to Leroy Smithingell was work-related, that Auto-Owners was not entitled to reimbursement for wage loss benefits, that Auto-Owners was entitled to recover reimbursement for medical expenses, that Auto-Owners' right to reimbursement for medical expenses was subject to the cost containment rules, and that Auto-Owners was entitled to 10 percent interest. 19a.

Auto-Owners appealed to the worker's compensation appellate commission contesting the magistrate's decision that Auto-Owners was not entitled to reimbursement of wage loss benefits and contesting the magistrate's decision that Auto-Owners' right to reimbursement of medical bills paid was subject to the worker's compensation cost containment rules. 1b-3b. Amoco cross-appealed to the WCAC. Amoco's cross-appeal specifically requested review solely as to the issue of whether Leroy Smithingell's injury was work-related. 4b-6b.

The WCAC affirmed the decision of the magistrate. 23a. Neither party specifically requested that the interest issue be reviewed by the WCAC and, therefore, appellate review of the issue was waived by both parties.

Appellate review of an interest award does not go to subject matter jurisdiction and may be waived. *VanderWall v Midkiff*, 186 Mich App 191, 201-202 (1990):

Defendants could have, and should have, initially raised the interest issue in the trial court prior to the first appeal and, if dissatisfied with the trial court's resolution of the issue, filed a cross-appeal to plaintiff's original appeal, raising the interest issue before this court in the original appeal. In other words, by choosing not to raise the interest issue by way of cross-appeal in the original appeal, defendants abandoned the issue....

Further, Amoco filed no application for leave to appeal or cross-appeal to the Court of Appeals raising this issue. Neither did Amoco make any request to the Court of Appeals for an order under MCR 7.205(B)(4) to include the interest issue in the appeal to the Court of Appeals. Amoco first raised the issue that the magistrate erred in awarding interest under MCL 418.801(6) in its appellee's brief in the Court of Appeals filed June 19, 2000. 12b-14b.

Amoco argues that Auto-Owners opened the door to consideration of the interest issue on appeal by raising the issue in Auto-Owners' appellant's brief filed on May 17, 2000. 7b-11b. Auto-Owners' brief did not attempt to raise the interest issue.

The Court of Appeals misconstrued the reference to MCL 418.852 in Auto-Owners' brief as an attempt to raise or contest the interest issue. A reading of the relevant portion of Auto-Owners' appellant's brief in the Court of Appeals demonstrates this. 11b.

The issue addressed in Auto-Owners' brief was the application of the worker's compensation cost containment rules to its right of reimbursement. The only time interest is mentioned in Auto-Owners' brief is the statutory reference to interest in the citation to MCL 418.852. However, review of the brief indicates that this statute was cited for the proposition that: "Auto-Owners Insurance Company is entitled to reimbursement for medical expenses directly from Amoco Production Company. Auto-Owners does not have to go through Mr. Smithingell to claim entitlement to reimbursement...." 11b. Even the Court of Appeals in its opinion notes that "plaintiff's ... request for 12 percent interest under MCL 418.852(2)" was "cursory." *Auto-Owners Ins Co v Amoco Production Co*, 245 Mich App 171, 178 (2001). A review of the brief indicates that the so-called request for 12 percent interest was not so much cursory as non-existent. In the event, Amoco seized on this reference to MCL 418.852(2) and attempted to transform it into a full blown discussion of interest. 12b-14b. This was improper as both parties had waived appellate review of the issue by failing to request the WCAC to review the specific issue. MCL 418.861(11).

ARGUMENT

I. Ancillary to its Jurisdiction Pursuant to §§ 841 and 847 of the WDCA to Determine Equitable Subrogation Claims Involving Reimbursement of Third-Parties for Medical Expenses Which Are Later Determined by the Bureau to Be Work-Related, the Bureau Has Jurisdiction to Grant Interest on the Amount Awarded as Reimbursement

Standard of Review: An inquiry into the nature, scope and elements of a remedy is in sum a question of law to be reviewed de novo. *Hartford Accident & Indemnity Co v Used Car Factory, Inc.*, 461 Mich 210, 215, n.5; 600 NW2d 630, 633, n.5 (1999). The Court reviews questions of law involved in any final order of the WCAC under a de novo standard of review. *Mudel v Great Atlantic and Pacific Tea Co*, 462 Mich 691, 697, n.3; 614 NW2d 607, 610, n.3 (2000).

This Court should not review the interest issue because the issue was waived when neither party specifically requested that it be reviewed by the WCAC. MCL 418.861(11). However, if this Court does reach the interest issue, the magistrate's award of interest should be upheld because the magistrate reached the right result for the wrong reason. A trial court's ruling which reaches the right result, although for the wrong reason, may be upheld on appeal. *Mulholland v DEC Intern Corp*, 432 Mich 395, 411, n.10; 443 NW2d 340 (1989).

Pursuant to MCL 418.841 and 847, the worker's compensation bureau has jurisdiction over any controversy concerning compensation. *Russell v Welcor, Inc.*, 157 Mich App 351, 354

(1987). This includes jurisdiction to determine equitable subrogation claims for reimbursement. *Ptak v Pennwalt*, 112 Mich App 490, 494 (1982). In actions for equitable restitution, the allowance of interest is discretionary. *L.A. Young Spring & Wire Corp v Falls*, 307 Mich 69, 108 (1943). In an equitable action for misappropriation of equitable funds, the Court decreed interest from the date of the appropriation. *Fisk v Fisk*, 328 Mich 570, 583 (1950).

In the instant case, the magistrate cited MCL 418.801(6) as his authority for the award of interest. *Brown v Eller Outdoor Advertising Co*, 139 Mich App 7; 360 NW2d 322 (1984), appears to be dispositive that subsection (6) governs interest only on work loss benefits.

Nevertheless, the magistrate did have jurisdiction under § 841 to determine equitable reimbursement claims and, ancillary to that jurisdiction, had discretion to award interest.

It should not be a matter in serious dispute that the award of interest to Auto-Owners was equitable and the award of interest by the magistrate may be upheld on the grounds that the magistrate reached the right result for the wrong reason.

RELIEF REQUESTED

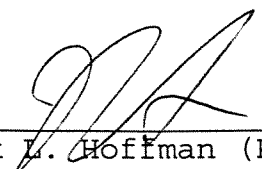
Plaintiff-appellee Auto-Owners Insurance Company requests that this Court determine that the interest issue was waived by the parties when neither party specifically requested the WCAC to

review the issue. In the alternative, Auto-Owners requests that the Court of Appeals affirmance of the award of 10 percent interest be affirmed.

Dated: June 21, 2002

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